

1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF ALABAMA

3 UNITED STATES OF AMERICA, 2:03-CR-182-KOB

4 PLAINTIFF, JULY 16, 2007

5 V. BIRMINGHAM, AL

6 KENNETH K. LIVESAY,

7 DEFENDANT.

* * * * *

8 TRANSCRIPT OF RESENTENCING
9 BEFORE THE HONORABLE KARON O. BOWDRE
10 UNITED STATES DISTRICT JUDGE

11 APPEARANCES:

12 FOR THE UNITED STATES:

13 JAMES D. INGRAM, AUSA
14 BIRMINGHAM, ALABAMA

15 FOR THE DEFENDANT:

16 THOMAS J. SPINA
17 BIRMINGHAM, ALABAMA

18 COURT REPORTER:

19 LINDY M. FULLER, RMR, CRR
20 BIRMINGHAM, ALABAMA 35203
21
22
23
24
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P R O C E E D I N G S

(IN OPEN COURT, 11:23 a.m.)

THE COURT: I APOLOGIZE FOR THE DELAY, BUT AS I THINK YOU MAY HEAR IN A WHILE, I HAVE WRITTEN FAR MORE TO THIS SENTENCING THAN I NORMALLY DO AND I DID NOT RECEIVE THE GOVERNMENT'S MEMO UNTIL AFTER I HAD LEFT THE OFFICE YESTERDAY. SO I DID NOT HAVE THE BENEFIT OF IT UNTIL LATE LAST NIGHT.

WE ARE HERE TODAY TO RESENTENCE THIS DEFENDANT IN ACCORDANCE WITH THE OPINION OF THE ELEVENTH CIRCUIT FILED APRIL 23, 2008, AND ISSUED AS A MANDATE ON MAY 22ND OF THIS YEAR. THAT OPINION VACATED THE SENTENCE AND REMANDED THE CASE FOR THIS COURT TO RESENTENCE.

SPECIFICALLY, THE ELEVENTH CIRCUIT DIRECTED THAT THE COURT FOLLOW THE PROCEDURAL RULES SET FORTH IN U.S. V. GALL IN CONSIDERATION OF THE FACTORS FOUND AT U.S.S.G, SECTION 5K1.1A AND ALSO IN CONSIDERING THE FACTORS AT 18 U.S.C. SECTION 3553(A).

THE COURT ALSO TAKES NOTE THAT THE BOOKER DECISION APPLIED TO CASES ON DIRECT APPEAL IN 2006 AND, THEREFORE, IN RESENTENCING THE DEFENDANT TODAY THE GUIDELINES WILL BE CONSIDERED AS ADVISORY ONLY PURSUANT TO THE BOOKER DECISION.

TO RECONFIRM THE COURT'S PREVIOUS FINDINGS, THE GUIDELINE LEVEL WAS CALCULATED TO BE LEVEL 28, WHICH, WHEN

1 COMBINED WITH THE CRIMINAL HISTORY CATEGORY OF I, RESULTED
2 IN A SENTENCING RANGE OF 78 TO 97 MONTHS AND A SUPERVISED
3 RELEASE TERM OF TWO TO THREE YEARS, WITH A FINE RANGE OF
4 \$12,500 TO ONE MILLION DOLLARS.

5 THE COURT HAS CONSIDERED THE GOVERNMENT'S MOTION
6 FOR SUBSTANTIAL ASSISTANCE DEPARTURE AND THE ARGUMENTS OF
7 COUNSEL AND FINDS THAT THAT MOTION SHOULD BE GRANTED.

8 MR. SPINA, DO YOU WISH TO BE HEARD OR TO MAKE ANY
9 COMMENT IN ADDITION TO THOSE INCLUDED IN YOUR SENTENCING
10 MEMORANDUM BEFORE THE COURT ANNOUNCES ITS CONCLUSIONS?

11 MR. SPINA: YES, YOUR HONOR, I THINK BOTH. YOU
12 WANT US TO STAND HERE?

13 THE COURT: THAT'S FINE.

14 MR. SPINA: I THINK BOTH OF US FEEL COMPELLED TO
15 SAY SOMETHING. IT'S UNUSUAL TO BE IN THIS POSITION, AND I
16 HAVE NEVER BEEN ENGAGED IN A SENTENCING OF AN INDIVIDUAL
17 FOR THREE TIMES.

18 TO PUT THAT IN PERSPECTIVE, I RECOGNIZE THAT THE
19 OFFENSE, WHICH HAS BEEN SAID SO MANY TIMES BY SO MANY
20 DIFFERENT PEOPLE WAS HORRIBLE, EXTRAORDINARY, MASSIVE, ALL
21 THE WORDS AND ADJECTIVES THAT HAVE BEEN USED TO DESCRIBE
22 THE UNDERLYING OFFENSE, PARTICULARLY IN THE GOVERNMENT'S
23 SENTENCING MEMO, THEY REFER ON NUMEROUS OCCASIONS TO
24 MR. LIVESAY AND OTHERS' CONDUCT. I THINK WE SHOULD FOCUS
25 ON MR. LIVESAY'S CONDUCT AND NOT THE CONDUCT OF OTHERS.

1 IT IS CLEAR THAT MR. LIVESAY HAS BEEN THROUGH A
2 LEGAL MORASS OF PROCEDURE. THE BEHAVIOR FOR WHICH WE
3 STAND BEFORE THE COURT TO BE SENTENCED OCCURRED ALMOST TEN
4 YEARS AGO. I WOULD SAY NINE YEARS AGO WOULD BE RELATIVELY
5 ACCURATE.

6 HIS INITIAL PLEA, AND THE COURT DIDN'T ASK ME IF
7 I HAD 35 DAYS TO REVIEW THE PRESENTENCE REPORT, I HAVE
8 ACTUALLY HAD 1,500 DAYS TO REVIEW THE PRESENTENCE REPORT.

9 THE COURT: THANK YOU, MR. SPINA, FOR POINTING
10 THAT OUT TO THE COURT.

11 MR. SPINA: THAT BEGAN FOUR YEARS AGO. AND EVERY
12 TIME A JUDGE EXERCISES HIS BOOKER DISCRETION, THE ELEVENTH
13 CIRCUIT SEEMS TO FIND FLAW. FIRST, ON A SUBSTANTIVE
14 REASONABLENESS STANDARD. THE SECOND TIME, ON A PROCEDURAL
15 ERROR WHICH IS WHY WE ARE HERE TODAY. THEY NEVER REACHED
16 SUBSTANTIVE REASONABLENESS IN LIVESAY TWO -- NEVER GOT
17 THERE.

18 I THINK THE ISSUE IS REALLY MORE FOCUSED THAN
19 GOING BACK TO REVISIT HOW WE GOT HERE TO BEGIN WITH, I
20 REALLY THINK WHAT WE ARE TALKING ABOUT is GOVERNMENT'S 5K
21 MOTION RECOMMENDING A 20 MONTH SENTENCE, WHICH IS A
22 SIGNIFICANT DEPARTURE IN AND OF ITSELF, BUT I THINK IT'S
23 APPROPRIATE BECAUSE IT RECOMMENDS OR AT LEAST MAKES
24 REFERENCE TO HOW EXTRAORDINARY, HOW TIMELY HIS COOPERATION
25 WAS. BUT THE COURT IS WELL AWARE THAT IT IS NOT BOUND BY

1 THE GOVERNMENT'S RECOMMENDATION AND, ON NUMEROUS OCCASIONS
2 IN THIS COURT, IN THIS BUILDING, LET ME SAY, JUDGES,
3 DISTRICT COURT JUDGES HAVE NOT GIVEN DEFENDANTS AS MUCH AS
4 THE GOVERNMENT IS ASKING FOR AND HAVE, ON OCCASION, GIVEN
5 DEFENDANTS MORE FOR THEIR ASSISTANCE THAN THE GOVERNMENT
6 HAS REQUESTED IN THEIR RECOMMENDATION.

7 THE GOVERNMENT HAS REQUESTED A 20 MONTH SENTENCE
8 WHICH IS, IN ESSENCE, A LEVEL FOURTEEN OFFENSE. THE
9 PREVIOUS SENTENCES WERE LEVEL TEN OFFENSES. SO WHEN WE
10 TALK ABOUT THE ELEVENTH CIRCUIT AND FROM THE GOVERNMENT
11 ABOUT THIS EXTRAORDINARY DEPARTURE, WE ARE REALLY TALKING
12 ABOUT FOUR LEVELS.

13 NOW, IF THE COURT WERE INCLINED TO ACCEPT THEIR
14 RECOMMENDATION BUT WANTS TO TWEAK IT SLIGHTLY, THE COURT
15 COULD DEPART TWO LEVELS, MORE ON THE 5K WHICH PUTS US TO A
16 LEVEL 20 OFFENSE, AND THEN CONSIDER THE 3553(A) FACTORS.
17 OR, WHICH TO ME, WHAT HAS BEEN LAID OUT THERE FOR THE
18 COURT, I AM NOT GOING INTO IT, I HAVE LAID IT OUT AS WELL
19 AS I KNOW HOW TO LAY IT OUT IN TERMS OF COMPARING HIS
20 ACTIONS AND BEHAVIOR WITH THOSE OTHERS THAT HAVE BEEN
21 SENTENCED. AND I THINK HE CLEARLY FITS IN AN AREA AND
22 REPUDIATION, THE IMPERFECT WITHDRAWAL, WHATEVER YOU WANT
23 TO CALL IT, DON'T CONSIDER IT FOR 5K, PLEASE DON'T
24 CONSIDER IT FOR 5K. CONSIDER IT AS A MATTER FOR VARIANCE.
25 IT'S NOT PERFECT. IF IT WERE PERFECT, WE PROBABLY WOULD

1 HAVE GONE TO TRIAL. WE DON'T LIVE IN A PERFECT WORLD.

2 WE ARE TRYING TO GET THE COURT TO IMPOSE,
3 REIMPOSE THE SENTENCE THAT HAS ALREADY BEEN IMPOSED. SO,
4 IN ESSENCE, I AM ASKING THE COURT TO IMPOSE A SENTENCE
5 THAT IS CONSISTENT WITH WHAT I AM REQUESTING. THE COURT
6 COULD GET TO LEVEL TEN TWO WAYS: GRANT THE GOVERNMENT'S
7 MOTION FOR 5K, IMPOSE WHAT THEY'RE REQUESTING AT A LEVEL
8 FOURTEEN, CONSIDER 3553(A) FACTORS WHICH IS SUPERLATIVE --
9 THE GREATEST HUMAN BEING I HAVE EVER HAD OPPORTUNITY TO
10 DEAL WITH AND REPRESENT. HE COULDN'T HAVE DONE BETTER.
11 YOU HEARD HIS TESTIMONY. YOU SAW HIM TESTIFY. LOOK WHAT
12 HE HAS DONE WITH HIS LIFE IN THE WAKE OF ALL THIS. WE ARE
13 TRYING TO -- YES, PUNISHMENT'S A FACTOR. THE GOVERNMENT
14 PRETEND LIKE GALL DIDN'T EVEN COME OUT. IT'S SORT OF LIKE
15 HOW THEY DEAL IT WITH GUIDELINES BEING ADVISORY -- THEY
16 IGNORE IT. AND THEY ARE NOT ASHAMED TO ADMIT IT AND I AM
17 OKAY WITH THAT. IT'S LIKE GUIDELINES ARE STILL MANDATORY,
18 WE ARE RECOMMENDING A GUIDELINE SENTENCE. IT'S NOT THE
19 LAW ANY MORE; THEY WANT TO GO BACK TO THE MARTIN CASE. MY
20 GOODNESS, THEY CITE MARTIN. MARTIN WAS DECIDED BEFORE
21 GALL. MARTIN DOESN'T HAVE ANY APPLICABILITY HERE.

22 THEY WANT TO TALK ABOUT PUGH. PUGH DOESN'T HAVE
23 ANY APPLICABILITY HERE. THAT CASE WAS ABOUT SUBSTANTIVE
24 REASONABLENESS, NOT ABOUT WHY WE ARE HERE TODAY. I AM NOT
25 GOING TO GO IN AND SAY ALL THE NICE THINGS THAT YOU COULD

1 SAY ABOUT KEN BECAUSE I HAVE SAID IT SO MANY TIMES, AND I
2 KNOW THE COURT TOOK THE TIME TO REVIEW WHAT I HAVE
3 SUBMITTED IN THIS INSTANCE AND WHAT I HAVE SUBMITTED ON
4 TWO PRIOR OCCASIONS.

5 I HAVE UPDATED WITH ONE LETTER FROM HIS WIFE.
6 HIS KIDS HAVE NOW, ONE HAS GRADUATED FROM COLLEGE, HAS
7 GONE ON TO WORK. ONE IS ABOUT TO GRADUATE FROM COLLEGE.
8 HE IS MAKING ENDS MEET, HIS WIFE IS STRUGGLING WITH HER
9 MEDICAL CONDITION TO MAKE EIGHT TO TEN BUCKS AN HOUR
10 WORKING OUT OF THE HOUSE BECAUSE SHE TRIED TO DO MORE BUT
11 COULDN'T BECAUSE OF HER HEALTH. YOU KNOW, PROBATION IS A
12 SENTENCE; GALL RECOGNIZES THIS, JUDGE. THE GOVERNMENT'S
13 GOT TO COME AROUND TO THE FACT THAT IT IS A SENTENCE.

14 IF THE COURT WERE INCLINED TO WANT TO NOTCH IT UP
15 A LITTLE BIT, TACK ON SOME COMMUNITY SERVICE TO GO WITH
16 THAT. BUT TO REMOVE THIS MAN FROM SOCIETY, TO BACK HIM
17 UP, TO PUT HIS FAMILY IN HARMS WAY SERVES NO PURPOSE, AT
18 LEAST FROM MY POINT OF VIEW AND FROM THE PARSIMONY
19 PROVISION IN THE SENTENCING STATUTE THAT WOULD MAKE IT --
20 JAIL WOULD NOT BE APPROPRIATE.

21 I WOULD LIKE TO RESERVE A FEW COMMENTS FOR AFTER
22 THE GOVERNMENT SPEAKS. I ASSUME THEY ARE GOING TO GET TO
23 SPEAK, AND I KNOW KEN WANTS TO SPEAK ALSO. THANK YOU,
24 JUDGE.

25 THE COURT: THANK YOU, MR. SPINA. MR. LIVESAY,

1 IS THERE ANYTHING YOU WOULD LIES TO SAY BEFORE THE COURT
2 PRONOUNCES SENTENCE?

3 THE DEFENDANT: YES.

4 THE COURT: TAKE YOUR TIME.

5 THE DEFENDANT: I APPRECIATE YOU LETTING ME
6 ADDRESS THE COURT TODAY, AND MY COMMENTS WILL BE BRIEF.

7 FIRST AND MOST IMPORTANTLY, I WANT TO TELL YOU
8 AND THIS COURT AND EXPRESS MY COMPLETE AND TOTAL REMORSE
9 AND SORROW FOR MY ROLE IN THE HEALTHSOUTH FRAUD. AND I
10 WANT TO AGAIN APOLOGIZE TO ALL THE VICTIMS OF THE FRAUD,
11 AND THERE WERE MANY. HEALTHSOUTH SHAREHOLDERS AND BOND
12 HOLDERS AND EMPLOYEES AND VENDORS AND OTHER STAKE HOLDERS,
13 THERE WERE A LOT OF PEOPLE NEGATIVELY IMPACTED BY WHAT WE
14 DID, AND I WANT TO APOLOGIZE TO ALL OF THEM. AND I WANT
15 THEM TO KNOW AND I WANT YOU TO KNOW THAT I ACCEPT COMPLETE
16 AND TOTAL RESPONSIBILITY FOR MY ACTIONS.

17 I MADE A LOT OF BAD CHOICES AND DECISIONS AND
18 THEY WERE MINE AND MINE ALONE, AND I DON'T BLAME ANYBODY
19 ELSE BUT MYSELF.

20 YOUR HONOR, YOU HAVE A UNIQUE PERSPECTIVE ON WHAT
21 WENT ON AT HEALTHSOUTH. YOU PRESIDED OVER A TRIAL THAT
22 LASTED SEVERAL MONTHS AND WENT INTO GREAT DETAIL ABOUT
23 WHAT WENT ON. AND YOU HEARD TESTIMONY FROM AND TESTIMONY
24 ABOUT MOST OF THE PEOPLE THAT PARTICIPATED IN THAT FRAUD.
25 AND I TESTIFIED FOR FOUR DAYS IN YOUR COURT AND I TRUST

1 THAT YOU REMEMBER AT LEAST SOME OF THAT TESTIMONY, AND I
2 HOPE THAT YOU REMEMBER MY STATE OF MIND WORKING AT
3 HEALTHSOUTH BEFORE THE FRAUD BEGAN AND THEN AS IT
4 DEVELOPED, EVOLVED AND SPUN OUT OF CONTROL.

5 AND WHAT IT WAS WHEN, IN 1999, I LEFT THE
6 ACCOUNTING DEPARTMENT. THREE AND A HALF YEARS LATER THE
7 FRAUD FINALLY CAME TO AN END AND IT WAS REVEALED, AND
8 SHORTLY THEREAFTER I CAME FORWARD AND PLED GUILTY AND
9 BEGAN TO COOPERATE. IN THE FIVE YEARS SINCE THEN, I HAVE
10 WORKED HARD TO REMAIN A PRODUCTIVE CITIZEN, I HAVE WORKED
11 HARD TO MAINTAIN STEADY EMPLOYMENT, WORKED HARD TO PROVIDE
12 FOR MY FAMILY. I WORKED HARD TO REMAIN ACTIVE IN MY
13 CHURCH AND IN MY COMMUNITY AND I AM THANKFUL TO A LOT OF
14 PEOPLE FOR SUPPORTING ME AND FORGIVING ME.

15 ALSO, DURING THOSE FIVE YEARS I HAVE NEVER, NEVER
16 HESITATED TO COOPERATE, PROVIDE ASSISTANCE WHENEVER ASKED
17 FROM THE GOVERNMENT, VARIOUS AGENCIES FROM THE GOVERNMENT,
18 FORENSIC AUDITORS, ACCOUNTANTS AND OTHERS REPRESENTING
19 HEALTHSOUTH. I HAVE MADE MYSELF AVAILABLE WHENEVER ASKED
20 AND BEEN TRUTHFUL, COMPLETELY TRUTHFUL, OPEN AND HONEST.
21 I HAVE TRIED TO HELP UNRAVEL THE MESS THAT WAS MADE AND I
22 BELIEVE AND I HOPE THAT THAT ASSISTANCE WAS BENEFICIAL.
23 SO AS I STAND HERE BEFORE YOU TODAY, I AM HOPING FOR SOME
24 RESOLUTION. I AM HOPING THAT SOMEHOW THIS SENTENCE THAT
25 WAS PREVIOUSLY RENDERED CAN SOMEHOW BE UPHELD.

1 I HAVE DONE EVERYTHING THAT WAS REQUIRED OF ME IN
2 MY PLEA AGREEMENT, EVERYONE EXPECTED OF ME IN MY PLEA
3 AGREEMENT, AND I HAVE MET ALL THE OBLIGATIONS THUS FAR OF
4 MY PREVIOUS SENTENCES. SO AT THIS POINT, FOR THE SAKE OF
5 MY FAMILY, MA'AM, I AM HOPING FOR CLOSURE. I KNOW YOU
6 HAVE A WHOLE LOT TO CONSIDER, AND I RESPECT THAT. I DO
7 ASK YOU TO PLEASE CONSIDER THE NEEDS OF MY FAMILY AS YOU
8 NOW DETERMINE THE APPROPRIATE SENTENCE. THANK YOU FOR
9 YOUR TIME.

10 THE COURT: THANK YOU. MR. INGRAM, DOES THE
11 GOVERNMENT HAVE ANYTHING TO SAY AT THIS TIME?

12 MR. INGRAM: YES, YOUR HONOR; THANK YOU. YOUR
13 HONOR, I KNOW THE COURT IS WELL VERSED IN CERTAINLY THIS
14 CASE AND THE ARGUMENTS THAT HAVE BEEN MADE BY BOTH SIDES,
15 BUT I WOULD LIKE FOR THE COURT'S BENEFIT AND FOR THE
16 RECORD JUST TO NOTE, TOUCH ON THREE KEY AREAS. OF COURSE,
17 THE NATURE OF THE OFFENSE THAT BRINGS US HERE TODAY, THE
18 GOVERNMENT'S 5K MOTION WHICH WAS FILED ON BEHALF OF
19 MR. LIVESAY, AND THEN THE PERTINENT FACTORS UNDER 3553(A)
20 THAT THE COURT CONSIDERS IN MAKING ITS SENTENCING
21 DETERMINATION.

22 IT PROBABLY GOES WITHOUT SAYING, BUT, OBVIOUSLY,
23 THIS WAS A MASSIVE CRIME, A LOSS OF AT LEAST 1.4 BILLION
24 DOLLARS. MR. LIVESAY WAS A KEY COMPONENT IN CREATING AND
25 FURTHERING AND DISGUIISING THE FRAUD FOR THREE AND A HALF

1 YEARS. AS ASSISTANT CONTROLLER, HE MADE UP THE NUMBERS,
2 HE FIGURED OUT WHERE TO HIDE THE FRAUD, HE DIRECTED
3 OTHERS, SUPERVISED OTHERS TO CARRY OUT THOSE ASSIGNMENTS.
4 HE WAS NOT THE PERSON ULTIMATELY BEHIND THE FRAUD, BUT HE
5 PLAYED A SIGNIFICANT ROLE IN HELPING TO CONDUCT THE FRAUD
6 AND TO KEEP IT HIDDEN FROM INVESTORS AND REGULATORS FOR
7 SEVERAL YEARS AGO UNTIL EVERYTHING CAME CRASHING DOWN IN
8 MARCH OF 2003.

9 BECAUSE OF THE NATURE OF THIS OFFENSE, THOSE, AND
10 THE FACTS UNDERLYING THAT, THAT'S HOW THE COURT, HOW
11 PROBATION REACHED THE LEVEL 28 BECAUSE OF THE SERIOUSNESS
12 OF THE BASE OFFENSE AND ENHANCEMENTS THAT WERE A PART OF
13 THE CRIME. MR. SPINA, IN ADDRESSING THE COURT, SOMEHOW
14 MANAGED TO STEP RIGHT OVER THE FACT THAT THE COURT
15 PREFACED ITS REMARKS BY NOTING THIS IS A LEVEL 28 OFFENSE.
16 HE MANAGED TO JUMP RIGHT TO LEVEL 10 AND THEN ASKS THE
17 COURT TO WHITTLE AWAY FROM THERE, TAKING INTO
18 CONSIDERATION THE VARIOUS FACTORS THAT IT HAS AT IT'S
19 DISPOSAL TO REDUCE THAT SENTENCE FURTHER.

20 ONCE THE FRAUD CAME TO LIGHT, MR. LIVESAY WAS
21 EXTREMELY COOPERATIVE. THAT WAS THE BASIS FOR THE
22 GOVERNMENT'S 5K MOTION. HE DID EVERYTHING THE GOVERNMENT
23 ASKED OF HIM. HE PROVIDED, INDEED, SUBSTANTIAL ASSISTANCE
24 WHENEVER ASKED, WHEREVER HE WAS ASKED TO DO SO. HE, OF
25 COURSE, AS THE COURT KNOWS, TESTIFIED AT LENGTH FOR FOUR

1 DAYS AT THE SCRUSHY TRIAL, ALSO TESTIFIED ON THE
2 GOVERNMENT'S BEHALF AT THE SONNY CRUMPLER TRIAL LATER ON
3 IN 2005. AGAIN, HIS ASSISTANCE WAS FULL AND COMPLETE AND
4 TRUTHFUL AND, FOR THAT REASON, THE GOVERNMENT, IN ESSENCE,
5 RENEWED THE 5K MOTION ORALLY AT THE SECOND SENTENCING AND
6 THEN IN WRITING. THE MOST RECENT TIME TO DOCUMENT THAT
7 FACT THAT BECAUSE OF THE ADDITIONAL SUBSTANTIAL
8 ASSISTANCE, THE GOVERNMENT'S RECOMMENDATION OF A SENTENCE,
9 A FURTHER DOWNWARD DEPARTURE TO THE NUMBER OF, THE FIGURE
10 OF 20 MONTHS.

11 NOW, THE 5K MOTION FROM THE MINIMUM GUIDELINE OF
12 78 MONTHS IS ROUGHLY A 75 PERCENT REDUCTION, WHICH I
13 BELIEVE IS A SIGNIFICANT REDUCTION AS MR. SPINA NOTED.
14 AND IT'S CERTAINLY WELL DESERVING. MR. LIVESAY IS INDEED
15 WELL DESERVING OF THAT REDUCTION. BUT THE POINT BEING
16 HERE IS THAT THAT SUBSTANTIAL ASSISTANCE DOES NOT WIPE THE
17 SLATE CLEAN. IT DOES NOT LESSEN INCREDIBLE DAMAGE THAT
18 WAS DONE, IT DOES NOT REPAIR THE FINANCIAL AND
19 PSYCHOLOGICAL DAMAGE THAT WAS DONE TO THE THOUSANDS OF
20 INVESTORS WHO LOST MILLIONS OF DOLLARS; MANY LOST THEIR
21 LIFE SAVINGS. DOESN'T LESSEN THE FACT THAT HUNDREDS OF
22 EMPLOYEES OF HEALTHSOUTH LOST THEIR JOBS AS A RESULT OF
23 FRAUD ONCE IT BECAME KNOWN TO THE PUBLIC. IT DOESN'T WIPE
24 THE SLATE CLEAN.

25 WITH REGARD TO THE OTHER FACTORS, AS THE COURT

1 KNOWS, THOSE FIVE FACTORS THAT IS REQUIRED TO REVIEW IN
2 DETERMINING HOW MUCH IT DOWNWARD DEPARTS ON THE BASIS OF
3 THE 5KS, ALL THOSE RELEVANT TO THE DEFENDANT'S ASSISTANCE.
4 AGAIN, THE DEFENDANT PROVIDED SUBSTANTIAL ASSISTANCE BUT
5 THAT DOES NOT, AGAIN, WIPE THE SLATE CLEAN.

6 THE COURT IS ALSO REQUIRED TO CONSIDER THE
7 FACTORS ENUMERATED UNDER 18 U.S.C. 3553(A). I BELIEVE
8 THERE WERE SEVEN LISTED, THREE THAT I BELIEVE ARE MOST
9 PERTINENT IN THIS CASE. ONE, THE NATURE AND CIRCUMSTANCES
10 OF THE OFFENSE AND THE HISTORY AND CHARACTERISTICS OF THE
11 DEFENDANT. TWO, THE NEED FOR THE SENTENCE IMPOSED TO
12 REFLECT THE SERIOUSNESS OF THE OFFENSE, TO PROMOTE RESPECT
13 FOR THE LAW AND TO PROVIDE A JUST PUNISHMENT FOR THE
14 OFFENSE, TO AFFORD ADEQUATE DETERRENCE TO CRIMINAL CONDUCT
15 AND THEN, FINALLY, IF NEEDED, TO AVOID UNWARRANTED
16 SENTENCING DISPARITIES AMONG DEFENDANTS IN A SIMILAR
17 SITUATION.

18 YOUR HONOR, AGAIN, THE SCOPE OF THIS CRIME IS
19 STILL DIFFICULT FOR PEOPLE TO GRASP. THE COMPANY
20 INVESTORS ARE STILL SUFFERING THE REPERCUSSIONS. THIS
21 TYPE OF CRIME IS A SERIOUS CRIME AND WARRANTS A
22 SIGNIFICANT PUNISHMENT. AWARDING THE DEFENDANT PROBATION
23 IN A 1.4 BILLION DOLLAR FRAUD WHERE HE WAS ACTIVELY
24 INVOLVED AT THE HEART OF IT, IN FURTHERING IT, IN
25 SUPERVISING OTHERS TO DO IT, IS NOT A JUST PUNISHMENT.

1 ONE OF THE ELEMENTS I TOUCHED ON, SENTENCING
2 DISPARITIES, FOR INSTANCE, EMERY HARRIS, WHO WAS
3 PREVIOUSLY SENTENCED TO A FIVE MONTH TERM OF IMPRISONMENT,
4 DID THE SAME WORK AS MR. LIVESAY. IN FACT, MR. LIVESAY
5 SUPERVISED EMORY HARRIS.

6 THE COURT: HE SUPERVISED EMERY HARRIS UNTIL
7 NOVEMBER OF 1999.

8 MR. INGRAM: CORRECT.

9 THE COURT: BUT EMERY HARRIS REMAINED IN THE
10 HEART OF THE FRAUDULENT ACTIVITY, IF I AM NOT MISTAKEN,
11 UNTIL MARCH OF 2003; CORRECT?

12 MR. INGRAM: THAT IS CORRECT. YOUR HONOR, WHICH
13 BRINGS ME TO ANOTHER POINT. ONE, AN ARGUMENT THAT MR.
14 SPINA HAS MADE ON BEHALF OF MR. LIVESAY IS THAT
15 MR. LIVESAY REPUDIATED, WITHDREW FROM THE CONSPIRACY. IN
16 A LEGAL SENSE, HE DID NOT DO THAT.

17 THE COURT: I AM AWARE HE DID NOT COMPLY WITH ALL
18 OF THE LEGAL --

19 MR. INGRAM: CORRECT.

20 THE COURT: -- REQUIREMENTS TO BE CONSIDERED TO
21 LEGALLY HAVE WITHDRAWN. BUT AFTER NOVEMBER 1999, IT'S MY
22 RECOLLECTION THAT HE DID NOT ACTIVELY PARTICIPATE IN ANY
23 OF THE FRAUDULENT ACTIVITY.

24 MR. INGRAM: NO, MA'AM, NOR DID HE DO ANYTHING TO
25 BRING THE FRAUD TO LIGHT. ALL MR. LIVESAY DID, FRANKLY,

1 WAS WALK UP THE HALL TO GET ANOTHER JOB SO HE DIDN'T HAVE
2 TO DEAL WITH THE DAY-TO-DAY CONDUCT OF A MASSIVE MULTI-
3 BILLION DOLLAR FRAUD. HE DIDN'T LEAVE THE COMPANY.

4 THE COURT: RIGHT.

5 MR. INGRAM: HE DIDN'T TURN ANYONE IN, DIDN'T
6 REPORT IT TO REGULATORS. HE DIDN'T DO NOTHING. HE JUST
7 DIDN'T WANT TO BE INVOLVED ANY MORE AND HE WENT UP THE
8 HALL. THAT'S NOT WALKING AWAY.

9 THE COURT: BUT MR. HARRIS REMAINED IN THE THICK
10 OF IT INVOLVED IN THE ACTIVE, DAY-TO-DAY ENTRY OF
11 FRAUDULENT INFORMATION ON TO THE HEALTHSOUTH BOOKS, RIGHT?

12 MR. INGRAM: HE JUST CONTINUED DOING THE WORK
13 THAT MR. LIVESAY HAD DONE PRIOR.

14 THE COURT: WITH A PROMOTION OR TWO, RIGHT? HE
15 WAS PROMOTED TO ASSISTANT CONTROLLER AND VICE-PRESIDENT?

16 MR. INGRAM: ARE YOU DISCUSSING MR. HARRIS?

17 THE COURT: I AM TALKING ABOUT MR. HARRIS.

18 MR. INGRAM: YOUR HONOR, MY MEMORY FAILS ME AS
19 EXACTLY WHAT, IF ANY, PROMOTIONS HE RECEIVED.

20 THE COURT: HE DID; ALL RIGHT.

21 MR. INGRAM: VERY WELL.

22 THE COURT: ALSO, KAY MORGAN HAD WORKED UNDER
23 MR. LIVESAY, CORRECT?

24 MR. INGRAM: CORRECT.

25 THE COURT: AND AFTER MR. LIVESAY LEFT THE

1 ACCOUNTING DEPARTMENT IN NOVEMBER OF 1999, KAY MORGAN ALSO
2 WAS PROMOTED TO ASSISTANT CONTROLLER AND CONTINUED
3 INVOLVEMENT IN THE FRAUDULENT ACTIVITY, I ALSO BELIEVE,
4 UNTIL MARCH OF 2003; CORRECT?

5 MR. INGRAM: I BELIEVE THAT'S CORRECT, YOUR
6 HONOR.

7 THE COURT: OKAY.

8 MR. INGRAM: ALL THOSE INDIVIDUALS CONTINUED
9 WORKING AT HEALTHSOUTH, WHETHER THEY WERE IN THE
10 ACCOUNTING DEPARTMENT OR UP THE HALL IN INFORMATION
11 TECHNOLOGY.

12 THE COURT: MR. LIVESAY WAS THE ONLY ONE WHO WENT
13 TO INFORMATION TECHNOLOGY, WASN'T HE?

14 MR. INGRAM: THAT'S CORRECT, YOUR HONOR. MY
15 POINT BEING THAT MR. LIVESAY, EVEN THOUGH HE WALKED AWAY
16 FROM THE ACCOUNTING DEPARTMENT, DID NOT DO ANYTHING TO
17 REPUDIATE THE CONSPIRACY OR TO WITHDRAW IN A FORMAL LEGAL
18 SENSE. HE JUST ELECTED NOT TO BE INVOLVED ANY MORE AND
19 SIMPLY WENT DOWN THE HALL TO ANOTHER JOB. SO TO THAT --

20 THE COURT: AND YOU ARE SAYING THAT DISTANCING
21 HIMSELF FROM THE DAY-TO-DAY FRAUDULENT ACTIVITIES DOES NOT
22 DISTINGUISH HIM FROM MR. HARRIS AND MS. MORGAN, WHO
23 CONTINUED TO PARTICIPATE IN THE DAY-TO-DAY ENTRY OF
24 FRAUDULENT INFORMATION INTO THE ACCOUNTING RECORDS OF
25 HEALTHSOUTH?

1 MR. INGRAM: THAT IS A DISCONTINUATION WITHOUT A
2 DIFFERENCE, YOUR HONOR. EVERY ONE OF THOSE INDIVIDUALS
3 WAS SIGNIFICANTLY INVOLVED IN THE CONDUCT OF THE FRAUD.
4 THE FACT --

5 THE COURT: SO THE COURT SHOULD NOT CONSIDER THE
6 LENGTH OF TIME THAT SOMEONE WAS INVOLVED IN THE FRAUDULENT
7 ACTIVITY AT ALL? THAT DOESN'T MAKE ANY DIFFERENCE?

8 MR. INGRAM: NO, THE COURT SHOULD EXAMINE THE
9 LENGTH OF INVOLVEMENT, THE EXTENT OF THE INVOLVEMENT, ALL
10 THE VARIOUS ASPECTS THAT SURROUND THE PERSON'S EMPLOYMENT.
11 THE PROFIT THAT WAS MADE AS A RESULT OF THEIR KNOWLEDGE
12 AND PARTICIPATION IN THE FRAUD, ALL THESE FACTORS SHOULD
13 BE TAKEN INTO ACCOUNT IN DECIDING WHAT AN APPROPRIATE
14 SENTENCE IS. AND MY POINT, YOUR HONOR, IS THAT ALTHOUGH
15 MR. LIVESAY COOPERATED, HE DID NOT COME FORWARD UNTIL THE
16 FRAUD WAS REVEALED.

17 SO IN CLOSING, BASICALLY, YOUR HONOR, QUITE FRANKLY,
18 TO SENTENCE AN INDIVIDUAL TO PROBATION UNDER THIS SET OF
19 FACTS IS, IN ESSENCE, A SLAP IN THE FACE TO ALL OF THE
20 INVESTORS ACROSS THE COUNTRY WHO PUT THEIR FAITH AND THEIR
21 HARD-EARNED MONEY INTO HEALTHSOUTH AND LOST IT AS A RESULT
22 OF THE FRAUD THAT MR. LIVESAY AND OTHER INDIVIDUALS
23 PARTICIPATED IN.

24 WHETHER MR. LIVESAY KNEW IT WAS FALSE, HE PROFITED
25 FROM IT AND HE SIMPLY JUST CONTINUED TO GO ALONG, TO

1 CONDUCT THE FRAUD AND FURTHER HIS PURPOSES. IT'S A SLAP
2 IN THE FACE, YOUR HONOR, ALSO TO THE EMPLOYEES OF
3 HEALTHSOUTH WHO LOST THEIR JOBS BECAUSE OF THE FRAUD.
4 IT'S, QUITE FRANKLY, A SLAP IN THE FACE TO THE CITIZENS OF
5 THIS DISTRICT WHO MAY BELIEVE THAT INDIVIDUALS WHO ARE
6 SENTENCED IN WHITE COLLAR TYPE OFFENSES SIMPLY BECAUSE
7 THEY MAKE A GOOD A SHOWING IN COURT AND BECAUSE OF THE
8 NATURE OF THEIR OFFENSE, THEY ARE ENTITLED TO PROBATION
9 AND WALK OUT OF THE COURTHOUSE WITHOUT BEING PUNISHED
10 APPROPRIATELY FOR THE NATURE OF THEIR CRIME.

11 THIS FINANCIAL CRIME CAN BE AS BAD AND, IN FACT, IN
12 THIS CASE, I BELIEVE MAY HAVE BEEN WORSE THAN OTHER TYPES
13 OF CRIMES THAT THIS COURT DEALS WITH ON A REGULAR BASIS.
14 AGAIN, BECAUSE OF THE SIGNIFICANCE, THE MASSIVENESS OF
15 THIS OFFENSE, A TERM OF IMPRISONMENT IS NECESSARY AND
16 APPROPRIATE IN THIS CASE TO MEET THE OBJECTIVES OF 3553.
17 THANK YOU, YOUR HONOR.

18 THE COURT: THANK YOU, MR. INGRAM. MR. SPINA?

19 MR. SPINA: WELL, I HAVE ONE WORD TO SAY BUT I
20 KNOW I AM NOT GOING TO STOP AT THE ONE WORD. BUT THE ONE
21 WORD --

22 THE COURT: WHEN YOU STARTED SAYING ONE WORD, I
23 KNEW YOU WOULDN'T BE STOPPING AT ONE WORD EITHER, MR.
24 SPINA.

25 MR. SPINA: THE ONE WORD IS BOTTS. RICHARD

1 BOTTS. SAME LEVEL, DIRECTOR OF TAXATION, REPORTED
2 DIRECTLY TO BILL OWENS, WORKED THROUGHOUT THE ENTIRE
3 FRAUDULENT PERIOD, SENTENCED TO 60 MONTHS OF PROBATION.
4 APPEALED, REVERSED, SENTENCED TO 60 MONTHS PROBATION AGAIN
5 AND THE GOVERNMENT DID NOT APPEAL. HOW CAN THEY SAY THE
6 THINGS THEY ARE SAYING IN HERE TODAY WITH THAT GLARING AT
7 THEIR INCONSISTENT AND INSINCERE WORDS?

8 NOW, THE REST OF MY WORDS. I DIDN'T JUMP TO
9 LEVEL 14 -- HE JUMPED TO LEVEL 14. WHY SHOULD I TALK
10 ABOUT HOW WE GOT FROM 28 TO 14 WHEN I AM ALREADY AT 14? I
11 DIDN'T GLOSS OVER ANYTHING. I AM NOT TRYING TO DOWNPLAY
12 THE EXTENSIVENESS, THE MASSIVENESS OF THIS FRAUD. HE IS A
13 SIGNIFICANT COG. HE IS SO SIGNIFICANT THAT WHEN HE LEFT
14 IT CONTINUED FOR THREE AND A HALF MORE YEARS. HE IS THAT
15 SIGNIFICANT.

16 HE IS A DISTINCTION WITH A DIFFERENCE. THOSE
17 AROUND HIM KNEW WHY HE WAS LEAVING. THEY DIDN'T LEAVE.
18 THE TWO PEOPLE YOU TALKED ABOUT WERE KAY MORGAN,
19 PROBATION, NO OBJECTION, NO APPEAL. WHERE IS THE
20 DISPARITY? THE DISPARITY IS IN WHAT HE HAS DONE, THOUGH,
21 THAT IS THE DISPARITY. AND ALTHOUGH NOT APPROPRIATE
22 FODDER FOR 5K, BUT SINCE THEY ARE RECOMMENDING A LEVEL 14
23 AND I AM ASKING THE COURT TO GO MAYBE TWO MORE LEVELS,
24 SINCE HIS TESTIMONY HE HAS CONSTANTLY DEALT WITH THE CIVIL
25 SUIT PEOPLE.

1 WHY IS THAT IMPORTANT? IT'S NOT A 5K TECHNICALLY
2 BUT IT'S HELPING THESE VICTIMS, THESE PEOPLE THAT HAVE
3 LOST THEIR LIFE SAVINGS THAT HE CONTINUES TO WANT YOU TO
4 BERATE. THEY NEED KEN LIVESAY. KEN LIVESAY HAS HELPED
5 THEM, NOT HURT THEM. HIS ACTIONS HURT THEM. HE IS TRYING
6 TO RIGHT THE WRONG. I AM JUST --

7 THE COURT: AND ON THAT POINT, I KNOW IT WAS NOT
8 THE ONLY FACTOR BUT CERTAINLY MR. LIVESAY'S COOPERATION
9 WITH THE PLAINTIFF'S COUNSEL IN THE HEALTHSOUTH LITIGATION
10 HELPED TO BRING ABOUT A SIGNIFICANT SETTLEMENT WITH
11 HEALTHSOUTH AND SOME OF THE OTHER DEFENDANTS IN THAT CASE
12 FOR THE BENEFIT OF THE SHAREHOLDERS, CORRECT?

13 MR. SPINA: THAT IS CORRECT, JUDGE. AND THE
14 JUDGE WAS CORRECT -- JUDGE, YOU WERE CORRECT -- SORRY, NOT
15 TALKING ABOUT YOU IN THE THIRD PERSON -- WHEN YOU
16 SUGGESTED EMERY HARRIS HAD RECEIVED A PROMOTION, THOSE
17 WERE ACCURATE FACTS. I DIDN'T KNOW WHETHER YOU WERE
18 ASKING IF THEY WERE BUT MR. LIVESAY RECALLS THAT --

19 THE COURT: HE AND KAY MORGAN BOTH, AM I CORRECT
20 ON THAT?

21 THE DEFENDANT: YES, MA'AM.

22 MR. SPINA: YES.

23 THE COURT: AND THEY BOTH STAYED WITH THE COMPANY
24 IN THE ACCOUNTING DEPARTMENT UNTIL THE FRAUD WAS DISCLOSED
25 IN MARCH OF 2003?

1 THE DEFENDANT: YES, MA'AM.

2 MR. SPINA: SO THAT'S LIKE FOUR YEARS MORE. WHEN
3 MR. LIVESAY HERE WAS TRYING TO DISTANCE HIMSELF. AND HIS
4 DISTANCING DIDN'T HAPPEN LIKE I AM NOT GOING TO GO THERE
5 ANY MORE. IT WAS THE PRODUCT OF HIS CONTINUED RESISTANCE
6 TO DO THE THINGS THEY WERE ASKING HIM TO DO THAT
7 ULTIMATELY RESULTED IN "I AM NOT GOING TO DO IT ANY MORE."
8 THEY TRIED TO GET HIM BACK THREE TIMES, I AM SURE
9 SPRINKLING IT WITH INCENTIVES. EACH TIME HE SAID NO,
10 THANKS, NOT GOING BACK THERE, NOT GOING TO DO IT. HE
11 DESERVES WHAT HE GOT AND THEY DESERVE TO LEAVE HIM ALONE.

12 THEY TALK ABOUT -- THEY DON'T EVEN PAY ANY
13 ATTENTION TO GALL. SO I WOULD SAY -- AND I LOVE HUMOR,
14 BECAUSE HUMOR HAS SAVED ME FROM THE STUFF I DEAL WITH, BUT
15 WHAT THEY NEED IS LESS GALL, THAT'S WHAT THEY NEED.

16 THE COURT: THANK YOU, MR. SPINA. MR. INGRAM, IS
17 THERE ANYTHING YOU WOULD LIKE -- WOULD YOU LIKE A REBUTTAL
18 OPPORTUNITY?

19 MR. INGRAM: YES, YOUR HONOR, I WOULD LOVE TO.

20 THE COURT: SPEAKING OF GALL, AND I AM TALKING
21 ABOUT THE CASE, NOT THE OTHER KIND THAT MR. SPINA REFERRED
22 TO, AS I READ GALL, I SEE A WHOLE LOT OF SIMILARITIES TO
23 THIS CASE. THE DISTRICT COURT JUDGE IN GALL PLACED A LOT
24 OF WEIGHT AND GAVE A LOT OF CONSIDERATION TO THE FACT THAT
25 THE DEFENDANT THERE, ALTHOUGH NOT A LEGAL WITHDRAWAL, HAD,

1 IN FACT, CEASED PARTICIPATING IN THE CONSPIRACY BEFORE IT
2 WAS UNCOVERED. AND THE SUPREME COURT SEEMED TO SAY THAT
3 THE DISTRICT COURT WAS WITHIN ITS DISCRETION IN GIVING
4 SIGNIFICANT WEIGHT TO THAT FACT. SO WHY SHOULD I NOT
5 LIKEWISE GIVE CONSIDERABLE WEIGHT TO THE FACT THAT THAT
6 MAN, MR. LIVESAY, CEASED ACTIVE INVOLVEMENT IN THE FRAUD
7 IN 1999, THREE AND A HALF YEARS BEFORE IT WAS UNCOVERED?

8 MR. INGRAM: YOUR HONOR, I AM NOT SURE I AM
9 FOLLOWING THE COURT'S LOGIC. IF I FOLLOW YOU CORRECTLY,
10 MAKING THE POINT THAT BECAUSE MR. LIVESAY WALKED AWAY FROM
11 THE FRAUD, AND I WILL USE THAT TERM LOOSELY BY WALKING
12 DOWN THE HALL, HE SOMEHOW IS NOW ABSOLVED FROM ANY
13 CRIMINAL RESPONSIBILITY.

14 THE COURT: NO, NO, I AM NOT SAYING HE IS
15 ABSOLVED FROM ANY CRIMINAL RESPONSIBILITY. BUT AS THE
16 DISTRICT COURT IN GALL DID, WHY SHOULD I NOT GIVE
17 SUBSTANTIAL WEIGHT TO THAT FACT? YOU'RE SEEMING TO SAY
18 THAT IT SHOULD MAKE NO DIFFERENCE --

19 MR. INGRAM: NO, YOUR HONOR.

20 THE COURT: -- BECAUSE THE FRAUD CONTINUED AND
21 PEOPLE WERE HURT AND THINGS WERE DONE, AND YOU ARE ASKING
22 ME TO IMPOSE A HIGHER SENTENCE ON HIM THAN ON THE OTHER
23 PEOPLE AT THE SAME LEVEL OF FRAUD WHO CONTINUED IN THE
24 FRAUD TO ITS VERY END.

25 MR. INGRAM: NO, YOUR HONOR, BECAUSE, ONE, I

1 DISAGREE WITH THE COURT BECAUSE MR. LIVESAY WAS NOT AT THE
2 SAME LEVEL. HAD HE, IN FACT, SUPERVISED MR. HARRIS,
3 SUPERVISED --

4 THE COURT: BUT MR. HARRIS ROSE TO THAT SAME
5 LEVEL. HE BECAME ASSISTANT CONTROLLER, THE SAME LEVEL
6 THAT MR. LIVESAY WAS AT WHEN HE WAS PARTICIPATING IN THE
7 FRAUD.

8 MR. INGRAM: BUT THAT DOESN'T CHANGE ANYTHING
9 ABOUT WHAT MR. LIVESAY DID, YOUR HONOR. WHILE HE WAS IN
10 PLACE CONDUCTING THE FRAUD, ORCHESTRATING, BEING AN
11 ARCHITECT OF THE FRAUD AND SUPERVISING OTHERS TO IMPLEMENT
12 THE NUMBERS, THE FALLS NAMES THAT HE HAD CREATED, THE FACT
13 THAT HE HAS ONE FROM A LEVEL STANDPOINT, THERE IS NO
14 WITHDRAWAL FROM THE CONSPIRACY. AND AS A PRACTICAL
15 MATTER, THE FACT THAT HE WALKED DOWN THE HALL AND JUST
16 SAID HE DIDN'T WANT TO PLAY ANY MORE WITH THE PEOPLE
17 CONDUCTING THE FRAUD I THINK WARRANTS SOME CONSIDERATION
18 BY THE COURT. BUT, FRANKLY, NOT A GREAT DEAL OF
19 CONSIDERATION BY THE COURT. HE DID NOTHING TO STOP THE
20 FRAUD, HE DID NOTHING TO UNDO THE FRAUD. HE SIMPLY JUST
21 DIDN'T WANT TO BE INVOLVED ANY MORE. HE DOESN'T HAVE THE
22 STOMACH TO BE INVOLVED IN THE FRAUD MY MORE AFTER THREE
23 AND A HALF YEARS, AFTER HAD HE MADE APPROXIMATELY CLOSE TO
24 THREE MILLION DOLLARS WHEN YOU ADD UP ALL THE BONUSES AND
25 STOCK OPTIONS RECEIVED BY BEING A GOOD SOLDIER AND

1 CONTINUING TO SEE THE FRAUD ADVANCE THE PURPOSES OF
2 HEALTHSOUTH BY FALSELY INFLATING IT'S NUMBERS ON WALL
3 STREET.

4 THE COURT IS CERTAINLY ENTITLED TO GIVE IT SOME
5 DISCRETION BUT THE SENTENCE THAT THE DISTRICT COURT
6 IMPOSES IS NOT UNFETTERED, YOUR HONOR. THE 11TH CIRCUIT
7 HAS MADE IT QUITE CLEAR IN THIS CASE AND THE OTHER
8 HEALTHSOUTH CASES THAT FROM THIS SCOPE OF A CRIME, THIS
9 MASSIVE A FRAUD IS VERY DIFFICULT TO RECONCILE AWARDED
10 PROBATION TO THIS DEFENDANT, GIVEN WHAT HE DID, WHAT HE
11 KNEW, HOW HE PROFITED FROM IT, WHEN YOU LOOK AT THE
12 FACTORS THAT WERE ENUMERATED IN 3553(A).

13 TO PROMOTE RESPECT FOR THE LAW AND TO AWARD THIS
14 DEFENDANT PROBATION FOR THREE AND HALF YEARS AT THE HEART
15 OF A MASSIVE FRAUD SUCH AS THE ONE AT HEALTHSOUTH IS NOT
16 DOING JUSTICE TO THE SYSTEM. AND, QUITE FRANKLY, IS A
17 SLAP TO EVERY HONEST, HARD-WORKING CITIZEN IN THIS
18 DISTRICT WHO LOOKS TO THIS COURT TO SEE THAT THE LAWS ARE
19 ADMINISTERED FAIRLY AND THE PEOPLE PAY FOR THEIR CRIMES.
20 TO IMPOSE A SENTENCE OF PROBATION IN THIS CASE IS NOT WHAT
21 3553(A) CALLS FOR, AND I THINK THE ELEVENTH CIRCUIT HAS
22 MADE THAT PRETTY CLEAR IN ITS PREVIOUS OPINION IS THAT
23 SUCH A SENTENCE IS VERY DIFFICULT, AT BEST, TO RECONCILE
24 WITH WHAT THE LAW IS SUPPOSED TO DO.

25 THE COURT: WHAT THE ELEVENTH CIRCUIT SAID, AT

1 LEAST IN LIVESAY THREE, WHICH IS THE ONE THAT'S BINDING AT
2 THIS TIME, WAS THAT THERE WERE PROCEDURAL ERRORS IN THE
3 PRONOUNCEMENT OF THE SENTENCE AND THAT THERE WAS NOT A
4 SUFFICIENT EXPLANATION ON THE RECORD FOR THE JUDGE'S
5 DECISION TO IMPOSE PROBATION IN HIS CASE.

6 MR. SPINA, YOU LOOK LIKE YOU ARE ABOUT TO JUMP
7 OUT OF YOUR SEAT.

8 MR. SPINA: THAT'S WHAT THEY SAID, BUT I'VE GOT
9 TO SAY SOMETHING ELSE. ARE YOU READY?

10 THE COURT: OKAY.

11 MR. SPINA: IT'S THE WORD AGAIN. BOTTS.
12 DIRECTOR OF TAXATION, FILED TAX RETURNS, INCLUDED IN THE
13 TAX RETURNS OVERSTATED EARNINGS. THE RESULT OF WHICH
14 CAUSED HEALTHSOUTH TO PAY MORE TAX THAN THEY SHOULD HAVE
15 PAID. CONTINUED THE FRAUD. STARTED OUT AS A LEVEL 38.

16 THE COURT: WAS MR. BOTTS INVOLVED IN 2002?

17 MR. SPINA: HE WAS THERE THROUGHOUT, TILL THE
18 END.

19 THE COURT: SO AFTER SARBANES-OXLEY?

20 MR. SPINA: THROUGH THE END.

21 THE COURT: THROUGH MCCAIN --

22 MR. SPINA: YES. HOW CAN HE SAY THESE THINGS?
23 THEY DIDN'T APPEAL THE PROBATION SENTENCE FOR MR. BOTTS
24 AND YET WE ARE TALKING ABOUT THESE POOR, HARD WORKING
25 PEOPLE LIKE -- IT SEEMS SO OBVIOUS TO ME. PLEASE TELL ME

1 I AM NOT ON ANOTHER PLANET SOMEWHERE. THIS JUST SEEMS SO
2 PLAIN TO ME WHAT'S HAPPENING HERE. AND HERE AGAIN, I
3 REALIZE WE'RE ONLY TALKING ABOUT FOUR LEVELS. WE ARE NOT
4 TALKING ABOUT SOME MASSIVE JUMP IN THE GUIDELINES. THAT'S
5 ALL.

6 THE COURT: THANK YOU, MR. SPINA.

7 MR. INGRAM: YOUR HONOR, MAY I RESPOND TO THAT
8 JUST ONE THING?

9 THE COURT: ALL RIGHT.

10 MR. INGRAM: I WOULD LIKE TO BRING TO THE COURT'S
11 ATTENTION, I THINK MR. SPINA, AND THE COURT HAD BEEN
12 MAKING MUCH OF THE FACT THAT MR. LIVESAY, IF YOU WILL, IN
13 A SENSE, IN A VERY LOOSE SENSE, LEFT THE CONSPIRACY WHEN
14 HE WENT TO THE I.T. DEPARTMENT INSTEAD OF -- HE STILL
15 REMAINED INVOLVED IN THE FRAUD, THERE WERE PEOPLE
16 CONSULTING WITH HIM. AFTER THAT POINT IN TIME WHEN HE
17 LEFT OTHER PEOPLE WHO STILL PARTICIPATED IN THE FRAUD
18 APPROACHED HIM WITH QUESTIONS, ASKED HIM TO COME BACK. SO
19 TO SAY THAT HE WAS TOTALLY REMOVED FROM THE FRAUD EVEN
20 AFTER HE LEFT IN 1999 IS NOT TOTALLY ACCURATE. THAT WAS,
21 THAT CAME OUT IN MS. LIVESAY'S TESTIMONY DURING THE
22 CRUMPLER TRIAL THAT PEOPLE CONTINUED TO APPROACH HIM AND
23 ASK QUESTIONS.

24 THE COURT: AND ASKED HIM TO COME BACK AND HE
25 REFUSED TO RETURN. I DON'T RECALL ANYTHING FROM MR.

1 CRUMPLER'S TESTIMONY. MY MEMORY IS NOT THE BEST IN THE
2 WORLD. IT'S BEEN A WHILE SINCE I HAVE REVIEWED THAT
3 TESTIMONY, BUT I DIDN'T RECALL THAT HE CONTINUED TO
4 PROVIDE ADVICE ABOUT FRAUD. I RECALL THEY ASKED HIM TO
5 COME BACK AND HE REFUSED.

6 MR. SPINA: YOUR HONOR'S RECOLLECTION IS
7 ACCURATE.

8 MR. INGRAM: FOR WHAT IT'S WORTH, YOUR HONOR,
9 PERHAPS WE DO NOT HAVE IT IN A FORMAL PACKAGE, BUT I HAVE
10 THE TESTIMONY OF MR. LIVESAY FROM THE CRUMPLER TRIAL WHICH
11 I WOULD BE HAPPY TO OFFER INTO EVIDENCE FOR THE COURT'S
12 CONSIDERATION.

13 THE COURT: CAN YOU POINT OUT TO ME SPECIFIC
14 STATEMENTS TO WHICH YOU WERE REFERRING?

15 MR. INGRAM: I DON'T KNOW THAT I AM ABLE TO DO
16 THAT ON THE SPOT, YOUR HONOR, WITHOUT DELAYING THE
17 PROCEEDINGS.

18 THE COURT: THEN WE'LL MOVE FORWARD. THE FIRST
19 MATTER THAT I NEED TO TAKE INTO CONSIDERATION IS THE
20 GOVERNMENT'S MOTION TO DEPART. AND AS I HAVE INDICATED, I
21 INTEND TO GRANT IT. THE QUESTION IS HOW FAR SHOULD I GO
22 IN A DEPARTURE? I HAVE CONSIDERED THE FACTORS CONCERNING
23 DEPARTURE FOUND AT U.S.S.G. SECTION 5K1.1 AND
24 SPECIFICALLY, I AM RELYING ON THE FOLLOWING FACTORS.

25 FIRST, THE COURT'S EVALUATION OF THE SIGNIFICANCE

1 AND USEFULNESS OF THE DEFENDANT'S ASSISTANCE, TAKING INTO
2 CONSIDERATION THE GOVERNMENT'S EVALUATION OF THE
3 ASSISTANCE RENDERED. I HAVE RELIED ON A DESCRIPTION OF
4 THE DEFENDANT'S ASSISTANCE FOUND IN THE GOVERNMENT'S
5 MOTION FOR DOWNWARD DEPARTURE. THE GOVERNMENT INDICATED
6 THAT THE DEFENDANT HAS PROVIDED INVALUABLE ASSISTANCE IN
7 HELPING THE FORENSIC AUDITOR DISCOVER IN AN EXPEDITIOUS
8 MANNER THE VERY WAYS IN WHICH THE MASSIVE FRAUD AT
9 HEALTHSOUTH WAS CONDUCTED. HE HAS PROVIDED A ROAD MAP FOR
10 THE WAY THE OFFICERS MANIPULATED THE COMPANY'S ACCOUNTS TO
11 GO PRESENT, WITH COMPLETELY FRAUDULENT OPERATING RESULTS.
12 HE EDUCATED INVESTIGATORS ABOUT THE VARIOUS METHODS THAT
13 HEALTHSOUTH AND ITS OFFICERS USED TO INFLATE ITS EARNINGS
14 AND TO HIDE THE FALSIFIED INCOME ON THE BALANCE SHEET. HE
15 PROVIDED ESSENTIAL INFORMATION HOPING TO QUANTIFY THE
16 HUNDREDS OF MILLIONS OF DOLLARS IN FICTITIOUS INCOME WHICH
17 APPEARED ON HEALTHSOUTH'S FINANCIAL STATEMENTS. I HAVE
18 ALSO CONSIDERED THE TRUTHFULNESS COMPLETENESS AND ANY
19 RELIABILITY OF ANY INFORMATION IN THE TESTIMONY PROVIDED
20 BY THE DEFENDANT.

21 THE GOVERNMENT'S INDICATED THAT THE DEFENDANT HAS
22 TRUTHFULLY AND COMPLETELY CONTESTED HIS MISDEEDS AND HAS
23 ALSO REVEALED WITHOUT HESITATION WHAT HE KNOWS ABOUT
24 PARTICIPATION OF OTHERS IN THE SCHEME. IN ADDITION, THE
25 DEFENDANT TESTIFIED FOUR DAYS AT THE TRIAL OF RICHARD

1 SCRUSHY AND FOR TWO DAYS AT THE TRIAL OF SONNY CRUMPLER.

2 THE COURT HAS CONSIDERED THE NATURE AND EXTENT OF
3 THE DEFENDANT'S ASSISTANCE. THE GOVERNMENT INDICATED THAT
4 THE DEFENDANT HAS BEEN AVAILABLE ON A CONTINUOUS AND
5 REGULAR BASIS AND HAS MET WHENEVER NEEDED ON AT LEAST TEN
6 OCCASIONS WITH VARIOUS AGENCIES OF THE UNITED STATES,
7 INCLUDING THE FBI, SECURITY AND EXCHANGE COMMISSION, THE
8 INTERNAL REVENUE SERVICE, AND THE DEPARTMENT OF HEALTH AND
9 HUMAN SERVICES. THE DEFENDANT PROVIDED BOTH GENERAL AND
10 SPECIFIC INFORMATION WHICH HAS BEEN OF ASSISTANCE TO THE
11 INVESTIGATION.

12 THE INFORMATION PROVIDED BY THE DEFENDANT HAS
13 INCLUDED BOTH DIRECT EVIDENCE OF CONVERSATIONS WITH
14 INDIVIDUALS AS WELL AS CIRCUMSTANTIAL EVIDENCE OF OTHER
15 CO-CONSPIRATORS' KNOWLEDGE. THE DEFENDANT PROVIDED THE
16 GOVERNMENT WITH DOCUMENTS WHICH HE MAINTAINED IN HIS
17 POSSESSION, SPECIFICALLY BECAUSE THEY WERE EVIDENCE OF THE
18 FRAUD AT HEALTHSOUTH.

19 THE COURT HAS ALSO CONSIDERED ANY INJURY SUFFERED
20 OR DANGER OR RISK OF INJURY TO THE DEFENDANT OR HIS FAMILY
21 RESULTING FROM HIS ASSISTANCE. THE COURT IS NOT AWARE OF
22 ANY INJURY OR DANGER PER SE; HOWEVER, THE COURT DOES
23 RECOGNIZE THE EMOTIONAL INJURY AND PAIN IN PROVIDING
24 EVIDENCE AND TESTIMONY AGAINST FORMER COLLEAGUES AND
25 FRIENDS AND THE PRESSURES THAT ARISE FROM HAVING DONE SO.

1 ALSO, THE COURT HAS CONSIDERED THE TIMELINESS OF
2 THE DEFENDANT'S ASSISTANCE. THE GOVERNMENT INDICATED THAT
3 THE DEFENDANT'S IMMEDIATE COOPERATION ALLOWED THE
4 HEALTHSOUTH CASE TO BE PROSECUTED, A PACE WHICH ON A
5 RELATIVE BASIS CONSTITUTES SWIFT AND EFFICIENT ENFORCEMENT
6 OF THE UNITED STATES CRIMINAL LAWS. FURTHER, THE DETAILS
7 OF THE FRAUDULENT SCHEME WERE EXPOSED TO THE PUBLIC
8 SHORTLY AFTER DISCOVERY OF THE FRAUD DUE IN PART TO THE
9 DEFENDANT'S COOPERATION. THE COURT CAN ALSO CONSIDER
10 OTHER FACTORS DEEMED APPROPRIATE TO THE COURT THAT RELATE
11 TO THE COOPERATION.

12 IN THIS CASE, THE COURT HAS HAD THE OPPORTUNITY
13 TO EVALUATE THE CREDIBILITY OF MR. LIVESAY'S TESTIMONY
14 ITSELF AT THE TRIAL OF RICHARD SCRUSHY. THE COURT
15 REMEMBERS FOUR DAYS OF TESTIMONY THAT MR. LIVESAY GAVE AS
16 WELL AS -- IN OPEN COURT, AS WELL AS TESTIMONY IN
17 CHAMBERS. AND THE COURT WAS PARTICULARLY IMPRESSED WITH
18 MR. LIVESAY'S CREDIBILITY. HE DID NOT ATTEMPT TO OVER
19 REACH IN HIS TESTIMONY BUT SPOKE EARNESTLY OF MATTERS
20 WITHIN HIS OWN PERSONAL KNOWLEDGE.

21 I UNDERSTAND THAT THE GOVERNMENT'S RECOMMENDATION
22 IS THE DEFENDANT RECEIVE A SENTENCE OF 20 MONTHS WITH A
23 5K1.1 DEPARTURE. THAT WOULD REQUIRE A DEPARTURE TO LEVEL
24 14. HOWEVER, BASED ON THE GOVERNMENT'S OWN WORDS USED TO
25 DESCRIBE DEFENDANT'S COOPERATION AND WHICH I HAVE QUOTED

1 ABOVE AT SOME LENGTH AND ALSO MY OWN EVALUATION OF THE
2 DEFENDANT'S CREDIBILITY, I FIND SUCH A RECOMMENDATION
3 INADEQUATELY REPRESENTS THE DEFENDANT'S COOPERATION.

4 THEREFORE, BASED UPON THESE 5K1.1 FACTORS, I FIND
5 THAT A DEPARTURE SHOULD BE GRANTED AND I DEPART TO LEVEL
6 12, WHICH, WHEN COMBINED WITH CRIMINAL HISTORY CATEGORY I,
7 RESULTS IN A SENTENCING RANGE OF TEN TO 16 MONTH AND A
8 FINE RANGE OF \$3,000 TO A MILLION DOLLARS. HOWEVER, AS
9 YOU KNOW, AS A RESULT OF BOOKER, THE DECISION OF AN
10 APPROPRIATE SENTENCE DOES NOT REST HERE. I AGREE WITH THE
11 GOVERNMENT THAT COOPERATION DOES NOT WIPE THE SLATE CLEAN
12 BUT A 5K MOTION DOES NOT END THE COURT'S INQUIRY INTO A
13 REASONABLE SENTENCE. THE COURT IS CHARGED WITH IMPOSING A
14 SENTENCE THAT IS SUFFICIENT BUT NOT GREATER THAN NECESSARY
15 TO MEET SENDING FACTORS FOUND AT SECTION 3553(A).

16 BEFORE PRONOUNCING SENTENCE IN THIS CASE, BASED
17 UPON THE GUIDELINE FACTORS AND THE DEFENDANT'S
18 COOPERATION, THE COURT MUST ALSO CONSIDER ALL OF THE
19 SENTENCING FACTORS FOUND AT 18 U.S.C. SECTION 3553(A). I
20 HAVE CONSIDERED ALL OF THOSE FACTORS AND SPECIFICALLY RELY
21 ON THE FOLLOWING FACTORS IN DETERMINING THE APPROPRIATE
22 SENTENCE: THE NATURE AND CIRCUMSTANCES OF THE OFFENSE.
23 THE COURT IS WELL AWARE OF THE MASSIVE FRAUD AT
24 HEALTHSOUTH AND THE IMPACT OF IT ON INNOCENT EMPLOYEES AND
25 INVESTIGATORS OF HEALTHSOUTH AND AGAIN ON BIRMINGHAM AS A

1 WHOLE. I THINK MORE THAN ENOUGH HAS BEEN SAID ABOUT THE
2 MASSIVE FRAUD, BUT THIS MAN IS NOT THE ONLY PERSON
3 RESPONSIBLE FOR THAT FRAUD.

4 THE COURT ALSO HAS CONSIDERED THE HISTORY AND
5 CHARACTERISTICS OF THIS DEFENDANT. BUT FOR HIS MISCONDUCT
6 AT HEALTHSOUTH, MR. LIVESAY HAS LIVED A LIFE ABOVE
7 REPROACH AND, SINCE HIS CONFESSION OF GUILT, HAS GIVEN
8 TESTIMONY IN THESE RELATED CASES. HE ALSO HAS GIVEN
9 TESTIMONY, ACCORDING TO HIS WIFE, TO GOD'S RESTORATIVE
10 GRACE, AND THE GUIDELINES TAKE INTO ACCOUNT ALL THE
11 NEGATIVE THAT A DEFENDANT DOES THAT DOES NOT PROVIDE ANY
12 CONSIDERATION OR ROOM FOR CONSIDERATION OF THE POSITIVE
13 FACTS IN A DEFENDANT'S LIFE. SO UNDER THE SENTENCING
14 FACTORS, THE COURT, HOWEVER, CAN AND SHOULD TAKE INTO
15 CONSIDERATION NOT JUST THE NEGATIVE BUT THE POSITIVE
16 CHARACTERISTICS OF A DEFENDANT.

17 THE COURT ALSO HAS CONSIDERED THE NATURE OF THE
18 SENTENCE IMPOSED TO REFLECT THE SERIOUSNESS OF THE
19 OFFENSE, TO PROMOTE RESPECT FOR THE LAW, AND TO PROVIDE
20 JUST PUNISHMENT FOR THE OFFENSE. THE GOVERNMENT SEEMS TO
21 BELIEVE THAT PROBATION NEVER IS JUST PUNISHMENT, AND I BEG
22 TO DIFFER. THE UNITED STATES SUPREME COURT IN GALL
23 RECOGNIZED THAT IN APPROPRIATE CASES PROBATION CAN BE
24 PUNISHMENT AND IS, IN FACT, PUNISHMENT.

25 THE COURT, IN GALL, SPECIFICALLY NOTED THAT

1 PROBATION RATHER THAN AN ACT OF LENIENCY IS A SUBSTANTIAL
2 RESTRICTION OF FREEDOM. THE SUPREME COURT NOTED THE
3 OFFENDERS ON PROBATION ARE NONETHELESS SUBJECT TO SEVERAL
4 CONDITIONS THAT SUBSTANTIALLY RESTRICT THEIR LIBERTY.
5 INHERENT IN THE VERY NATURE OF PROBATION IS THAT
6 PROBATIONERS DO NOT ENJOY THE ABSOLUTE LIBERTY TO WHICH
7 EVERY CITIZEN IS ENTITLED. PROBATIONERS MAY NOT LEAVE THE
8 JUDICIAL DISTRICT, MOVE OR CHANGE JOBS WITHOUT NOTIFYING
9 AND, IN SOME CASES, IN RECEIVING PERMISSION FROM THEIR
10 PROBATION OFFICE OR THE COURT. THEY MUST REPORT TO THE
11 PROBATION OFFICER FOR UNANNOUNCED VISITS TO THEIR HOMES,
12 REFRAIN FROM ASSOCIATING WITH ANY PERSON CONVICTED OF A
13 FELONY, ET CETERA.

14 SO TO SAY THAT THE ONLY FORM OF JUST PUNISHMENT
15 IN A CASE OF THIS NATURE IS IMPRISONMENT AVOIDS
16 RECOGNIZING THE REALITIES OF PROBATION. IN ORDER TO
17 AFFORD ADEQUATE DETERRENCE TO CRIMINAL CONDUCT AGAIN,
18 INCARCERATION IS NOT THE ONLY FORM OF DETERRENCE. I HAVE
19 CONSIDERED WHETHER THERE IS ANY NEED TO PROTECT THE PUBLIC
20 FROM FURTHER CRIMES OF THE DEFENDANT AND NO SUCH NEED
21 EXISTS IN THIS CASE BASED UPON MR. LIVESAY'S CHARACTER.

22 PROBABLY THE FACTOR THOUGH THAT I HAVE CONSIDERED
23 THE MOST AND AT GREATEST LENGTH IS THE NEED TO AVOID
24 UNWARRANTED SENTENCE DISPARITIES AMONG DEFENDANTS WITH
25 SIMILAR RECORDS WHO HAVE BEEN FOUND GUILTY OF SIMILAR

1 CONDUCT. NOW, LET ME SAY THAT IF I WERE IMPOSING SENTENCE
2 ON ALL OF THE PEOPLE WHO PLED GUILTY OR WHO WERE CONVICTED
3 TO THE FRAUD AT HEALTHSOUTH, I MIGHT HAVE COME UP WITH A
4 DIFFERENT STRUCTURING OF SENTENCES. BUT I AM LEFT TO WORK
5 WITH NOT A CLEAN SLATE BUT THE SLATE OF THE SENTENCES THAT
6 HAVE PREVIOUSLY BEEN IMPOSED. AND IN EVALUATING THOSE
7 OTHER SENTENCES, I HAVE DONE MY BEST TO EVALUATE THE
8 CONDUCT OF MR. LIVESAY AND COMPARE IT TO THE CONDUCT OF
9 THE OTHER DEFENDANTS WHO HAVE BEEN SENTENCED AND ALSO
10 COMPARE IT THEN TO THOSE SENTENCES. THE GOVERNMENT IN
11 THIS CASE URGES THAT THE ONLY APPROPRIATE SENTENCE IS ONE
12 OF IMPRISONMENT AND, IN FACT, SEEKS A 20 MONTH PRISON
13 TERM. SUCH A PRISON TERM, HOWEVER, WOULD PLACE
14 MR. LIVESAY IN THAT SAME CATEGORY WITH WESTON SMITH WHO
15 HAD SERVED AS C.F.O. AND WHO RECEIVED A 27 MONTH SENTENCE,
16 WITH MIKE MARTIN, ALSO A CF, WHO RECEIVED A 36 MONTH
17 SENTENCE, AND WOULD PLACE HIM ABOVE EMERY HARRIS WHO ROSE
18 TO THE LEVEL OF VICE-PRESIDENT AS WELL AS ASSISTANT
19 CONTROLLER, WHO COVERED THE FRAUD UNTIL ITS END IN 2003,
20 WHO RECEIVED A FIVE MONTH CUSTODIAL SENTENCE.

21 THE COURT ALSO NOTES WILLIAM OWENS, WHO SERVED IN
22 VARIOUS CAPACITIES FROM THE VERY BEGINNING OF THE FRAUD TO
23 ITS END, INCLUDING C.F.O. AND CEO, RECEIVED A FIVE YEAR
24 SENTENCE. OWENS, MARTIN, SMITH, AARON BEING, MR. LIVESAY
25 AND OTHERS WERE ALL INVOLVED IN THE EARLY STAGES OF THE

1 ACCOUNTING FRAUD, AND THE COURT RECOGNIZES THAT.
2 MR. LIVESAY WORKED UNDER, HOWEVER, THE C.F.O. AND THE
3 CONTROLLER AND DID THEIR INSTRUCTION. HE DID DIRECT EMERY
4 HARRIS, KAY MORGAN AND OTHERS AS TO THE SPECIFIC ENTRIES
5 TO MAKE; HOWEVER, IN NOVEMBER OF 1999, MR. LIVESAY COULD
6 NO LONGER STOMACH THE FRAUD. I APPRECIATE MR. INGRAM
7 USING THOSE TERMS BECAUSE THAT WAS WHAT I RECALLED
8 MR. LIVESAY HAVING TESTIFIED TO, THAT HE COULD NO LONGER
9 STOMACH THE FRAUD, AND HE REQUESTED AND RECEIVED A
10 TRANSFER OUT OF ACCOUNTING. HE BECAME CHIEF INFORMATION
11 OFFICER IN HEALTHSOUTH'S INFORMATION TECHNOLOGY DEPARTMENT
12 ALTHOUGH, AS THE GOVERNMENT ARGUES, HE CONTINUED TO
13 BENEFIT FROM THE FRAUD BY RECEIVING BONUSES AND INFLATED
14 STOCK. HE NO LONGER ACTIVELY PARTICIPATED IN THE FRAUD.
15 MR. LIVESAY'S CESSATION OF ACTIVE PARTICIPATION IN THE
16 FRAUD DOES NOT MEET THE LEGAL REQUIREMENTS OF WITHDRAWAL
17 FROM THE CONSPIRACY SO AS TO PRECLUDE HIM FROM ANY
18 LIABILITY FOR THE CONSPIRACY BECAUSE HE DID NOT TAKE STEPS
19 TO DISCLOSE THE FRAUD OR BRING IT TO AN END.

20 MR. LIVESAY WAS AN ACCOUNTANT, NOT A LAWYER, AND
21 THE COURT DOUBTS THAT HE WAS AWARE OF THOSE LEGAL
22 REQUIREMENTS IN 1999. BUT THE FACT REMAINS THAT HE CEASED
23 HIS ACTIVE PARTICIPATION IN THE CONSPIRACY THREE AND A
24 HALF YEARS BEFORE THE FRAUDULENT PRACTICES AT HEALTHSOUTH
25 CAME TO AN ABRUPT END IN MARCH OF 2003. IN CONTRAST,

1 EMERY HARRIS AND KAY MORGAN, WHO DID INITIALLY WORK UNDER
2 MR. LIVESAY, WERE BOTH PROMOTED TO ASSISTANT CONTROLLER
3 AND ULTIMATELY TO VICE-PRESIDENT POSITIONS. THEY
4 CONTINUED ACTIVE PARTICIPATION IN THE FRAUD LONG AFTER
5 MR. LIVESAY LEFT THE ACCOUNTING DEPARTMENT AND WERE STILL
6 PARTICIPANTS IN THE FRAUD IN MARCH OF 2003.

7 A FURTHER DISTINCTION BETWEEN MR. LIVESAY AND THE
8 OTHER DEFENDANTS IN THE HEALTHSOUTH FRAUD OR AT LEAST SOME
9 OF THE OTHER DEFENDANTS IN THE HEALTHSOUTH FRAUD IS THAT
10 MR. LIVESAY'S PARTICIPATION CEASED LONG BEFORE SARBANES-
11 OXLEY BECAME THE LAW AND STIRRED THINGS UP AT HEALTHSOUTH
12 IN THE SUMMER OF 2002. TO RECAP SOME OF THE OTHER
13 SENTENCES, BILL OWENS, THE MASTERMIND OF THE DETAILS OF
14 THE FRAUD FROM DAY ONE THROUGH MARCH 2003 WHO ROSE FROM
15 ASSISTANT CONTROLLER TO BECOME C.F.O. AND THEN CEO
16 RECEIVED FIVE YEARS IN PRISON. MIKE MARTIN, WHO WAS A
17 C.F.O. FOR A SUBSTANTIAL PART OF THE CONSPIRACY, RECEIVED
18 36 MONTHS. MALCOM MCVAY, WHO WAS ONE TIME, AND IT'S MY
19 RECOLLECTION IT WAS FOR A SHORT PERIOD OF TIME, C.F.O. AND
20 TREASURER, RECEIVED 60 MONTHS PROBATION SENTENCE WITH SIX
21 MONTHS HOME DETENTION IN A LARGE PART BECAUSE OF HEALTH
22 ISSUES THAT ARE NOT RELEVANT HERE, AND THAT SENTENCE IS
23 AGAIN ON APPEAL.

24 AARON BEAM WAS C.T.O. AT THE TIME OF THE FRAUD
25 BUT LEFT EARLY ON. HE RECEIVED A THREE MONTHS CUSTODIAL

1 SENTENCE BASED UPON ONE CHARGE OF BANK FRAUD. AS MR.
2 SPINA POINTS OUT, RICHARD BOTTS, WHO WAS SENIOR VICE-
3 PRESIDENT AND IN THE TAXATION DEPARTMENT DURING THE ENTIRE
4 PERIOD OF THE FRAUD, INCLUDING AFTER SARBANES-OXLEY,
5 RECEIVED A PROBATIONARY SENTENCE OF 60 MONTHS AND WAS
6 RESENTENCED TO THE SAME SENTENCE AND THE GOVERNMENT DID
7 NOT APPEAL THAT SENTENCE. BUT THOSE DEFENDANTS THAT I
8 INITIALLY WERE REFERRING TO BEFORE I JUMPED TO MR. BOTTS
9 WERE ALL DEFENDANTS WHO OCCUPIED POSITIONS AT HEALTHSOUTH
10 ABOVE MR. LIVESAY, WHO WAS ASSISTANT CONTROLLER DURING THE
11 ENTIRE TIME OF HIS PARTICIPATION OF THE FRAUD.

12 I HAVE ALREADY MENTIONED EMERY HARRIS' SENTENCE
13 OF FIVE MONTHS CUSTODY EVEN THOUGH HE PARTICIPATED IN THE
14 FRAUD UP TO ITS BITTER END, AND THEN KAY MORGAN RECEIVED A
15 48 MONTHS PROBATIONARY SENTENCE, WHICH I DO NOT BELIEVE
16 WAS APPEALED, EVEN THOUGH HE WAS PARTICIPATING IN THE SAME
17 KIND OF CONDUCT THAT MR. LIVESAY PARTICIPATED IN AND THE
18 GOVERNMENT NOW ARGUES MERITS 20 MONTHS IN CUSTODY.

19 THE COURT GIVES GREAT CONSIDERATION TO THE FACT
20 THAT MR. LIVESAY CEASED ACTIVE PARTICIPATION IN THE FRAUD
21 BEFORE ANY OF THE OTHERS WHOSE SENTENCES I HAVE JUST
22 OUTLINED EXCEPT PERHAPS MR. BEAM. YES, HE DID PLAY A
23 SIGNIFICANT ROLE IN THE EARLY YEARS OF THE FRAUD BUT HE
24 SAW THE ERROR OF HIS WAYS AND REPENTED, AT LEAST TO THE
25 EXTENT OF NOT COMMITTING ANY FURTHER FRAUDULENT ACTIVITY

1 AT HEALTHSOUTH. THAT CHANGE OF BEHAVIOR WARRANTS A
2 SENTENCE THAT DIFFERS FROM THE CUSTODIAL SENTENCES IMPOSED
3 ON THOSE WHO ACTIVELY PARTICIPATED AT A HIGHER LEVEL AND
4 LONGER THAN MR. LIVESAY. IT ALSO JUSTIFIES, IN MY
5 OPINION, A DIFFERENT SENTENCE THAN RECEIVED BY EMERY
6 HARRIS, WHO CONTINUED TO PARTICIPATE IN THE FRAUD FAR
7 LONGER THAN MR. LIVESAY.

8 THEREFORE, PURSUANT TO THE COURT'S AUTHORITY
9 UNDER BOOKER TO IMPOSES A SENTENCE OUTSIDE THE GUIDELINE
10 RANGE AND ALSO EXERCISING THE DISCRETION OF THE COURT
11 RECOGNIZED BY THE UNITED STATES SUPREME COURT IN GALL, THE
12 COURT FINDS THAT THE DEFENDANT SHOULD BE SENTENCED TO A
13 TERM OF FIVE YEARS PROBATION AS TO COUNTS ONE AND TWO
14 SEPARATELY, TO BE SERVED CONCURRENTLY WITH THE OTHER. THE
15 DEFENDANT SHALL RECEIVE CREDIT FOR ALL TIME HE HAS SERVED
16 ON PROBATION AND HIS ORIGINAL PROBATION EXPIRATION DATE
17 REMAINS IN EFFECT. MY STRONG OPINION IS THAT THE SENTENCE
18 JUST IMPOSED IS REASONABLE AND APPROPRIATE WHEN TAKING
19 INTO ACCOUNT THE 5K1.1 DEPARTURE FACTORS DISCUSSED ABOVE
20 ALONG WITH THE FACTORS AT 18 U.S.C. SECTION 3553(A). THE
21 EXTRAORDINARY FACTS OF THIS DEFENDANT'S ASSISTANCE AND THE
22 FACTS RELATED TO THE SENTENCES IMPOSED UPON THE OTHER
23 DEFENDANTS JUSTIFY A SUBSTANTIAL VARIANCE AT SENTENCING
24 GUIDELINE RANGE AS DETERMINED WITH A DEPARTURE.

25 I HAVE ALREADY COMMENTED UPON THE NATURE OF

1 PUNISHMENT OF PROBATION. PROBATION IS NOT A CAKE WALK; IT
2 IS SUBSTANTIAL PUNISHMENT. IT IS SUBSTANTIAL PUNISHMENT
3 FOR A CPA TO LOSE HIS LICENSE AS A RESULT OF HIS FELONY
4 CONVICTION. IT IS SUBSTANTIAL PUNISHMENT FOR A PERSON TO
5 LIVE FOR ALMOST FIVE YEARS NOW WITH THE UNCERTAINTY THAT
6 HAS BEEN CAUSED BY THE REPEATED APPEALS BY THE GOVERNMENT
7 OF THE DEFENDANT'S SENTENCE. THIS SWORD OF DAMOCLES HAS
8 HUNG OVER MR. LIVESAY'S HEAD FAR TOO LONG, AND IT'S TIME
9 NOW FOR THIS ORDEAL TO BE OVER.

10 WHILE ON PROBATION, THE DEFENDANT IS SUBJECT TO
11 THE STANDARD CONDITIONS PROVISION OF RECORD OF THIS COURT
12 AND THE FOLLOWING SPECIAL CONDITIONS: THE MANDATORY DRUG
13 TESTING PROVISION OF 18 U.S.C. SECTION 3563(A) ARE WAIVED
14 UPON THE COURT'S FINDING THAT THE OFFENSE OF CONVICTION IS
15 NOT DRUG RELATED. THERE IS NO CURRENT OR PAST HISTORY OF
16 SUBSTANCE ABUSE AND THAT IS LOW RISK OF ANY FUTURE
17 SUBSTANCE ABUSE BY THE DEFENDANT.

18 SECONDLY, THE DEFENDANT SHALL SERVE SIX MONTHS
19 HOME DETENTION WHICH MAY INCLUDE ELECTRONIC MONITORING
20 UNDER THE ADMINISTRATIVE SUPERVISION OF THE PROBATION
21 OFFICER. THE DEFENDANT SHALL PAY THE COST OF MONITORING
22 UNLESS THE PROBATION OFFICER DETERMINES THAT THE DEFENDANT
23 DOES NOT HAVE THE ABILITY TO DO SO. THE DEFENDANT HAS
24 ALREADY FULFILLED THAT CONDITION OF PROBATION. I AM NOT
25 IMPOSING A SECOND TERM OF HOME CONFINEMENT MR. LIVESAY;

1 YOU HAVE ALREADY DONE THAT. THE DEFENDANT IS ORDERED TO
2 PAY A FINE OF \$10,000 AS PREVIOUSLY IMPOSED, WITH INTEREST
3 WAIVED. THAT SENTENCE HAS ALREADY -- EXCUSE ME, THAT FINE
4 HAS ALREADY BEEN PAID IN FULL. THE DEFENDANT IS TO PAY
5 THE MANDATORY ASSESSMENT FEE OF \$200. THAT ASSESSMENT FEE
6 HAS ALSO ALREADY BEEN PAID IN FULL BY THE DEFENDANT.

7 PURSUANT TO 18 U.S.C. SECTION 3663 (A)(C)(3), THE
8 COURT FINDS A NUMBER OF IDENTIFIABLE VICTIMS IS SO LARGE
9 AS TO MAKE RESTITUTION IMPRACTICABLE IN DETERMINING
10 COMPLEX ISSUES OF FACT RELATED TO THE CAUSE OR THE AMOUNT
11 OF THE VICTIMS' LOSSES WOULD COMPLICATE OR PROLONG THE
12 SENTENCING PROCESS TO A DEGREE THAT THE NEED TO PROVIDE
13 RESTITUTION TO ANY VICTIM IS OUTWEIGHED BY THE BURDEN ON
14 THE SENTENCING PROCESS. THE DEFENDANT, HOWEVER, IS
15 FURTHER ORDERED TO FORFEIT TO THE UNITED STATES PROPERTY
16 IN THE AMOUNT OF \$750,000, AND THE DEFENDANT HAS ALREADY
17 COMPLIED WITH THAT FORFEITURE ORDER.

18 IS THERE ANY OBJECTION FROM ANY PARTY AS TO THE
19 FINDING OF FACT, THE CALCULATION OF SENTENCE OR THE MANNER
20 IN WHICH THE SENTENCE WAS PRONOUNCED OR IMPOSED, OTHER
21 THAN THOSE PREVIOUSLY STATED FOR THE RECORD?

22 MR. INGRAM: YOUR HONOR, THE GOVERNMENT HAS A FEW
23 OBJECTIONS WE WOULD LIKE TO MAKE ON THE RECORD, PLEASE.

24 THE COURT: ALL RIGHT.

25 MR. INGRAM: BEFORE I GET TO THOSE, YOUR HONOR, I

1 WOULD ASK THE COURT'S GUIDANCE ON, LIKE TO EITHER OFFER
2 THE TESTIMONY OF KEN LIVESAY FROM THE CRUMPLER TRIAL OR
3 ASK LEAVE OF THE COURT TO SUBMIT THAT, INCLUDE THAT IN THE
4 RECORD IN THIS PROCEEDING. AND OF COURSE, WE WILL BE
5 HAPPY TO SUPPLY IT TO MR. LIVESAY'S ATTORNEY TO INCLUDE IT
6 AS PART OF THE RECORD.

7 THE COURT: SEEMS TO ME IF YOU ARE GOING TO
8 INCLUDE HIS TESTIMONY FROM THE PRIOR TRIAL YOU SHOULD ALSO
9 INCLUDE HIS TESTIMONY FROM THE SCRUSHY TRIAL.

10 MR. INGRAM: OH, VERY WELL.

11 THE COURT: SO WE CAN JUST REALLY LOAD UP THE
12 RECORD IF YOU WANT TO.

13 MR. INGRAM: VERY WELL, YOUR HONOR.

14 THE COURT: MR. SPINA DO YOU HAVE ANY OBJECTIONS
15 TO THAT?

16 MR. SPINA: TO PUTTING IT ALL IN OR TO PUTTING --

17 THE COURT: WHICHEVER.

18 MR. SPINA: WELL, I MEAN, THE EVIDENCE BEFORE THE
19 COURT TODAY IS THAT IT DIDN'T EXIST. I MEAN, I CAN'T
20 REMEMBER WHAT HE SAID. HE IS CONFIDENT HE DIDN'T SAY
21 THAT. I WOULD OBJECT TO ANY FURTHER CLUTTER IN A RECORD
22 THAT IS ALREADY OVERWHELMING. BUT IF THE COURT WERE GOING
23 TO LET IT IN, I WOULD WANT IT ALL IN.

24 THE COURT: I WILL STATE THAT NOT LAST NIGHT BUT
25 SEVERAL MONTHS AGO WHEN THIS CASE CAME BACK AND LANDED IN

1 MY LAP, I DID REVIEW MR. LIVESAY'S TESTIMONY IN THE
2 CRUMPLER CASE. AND IF MY MEMORY IS IN ERROR, IT WOULD BE
3 AS TO A VERY MINOR ASPECT OF MY DECISION TODAY.

4 MR. INGRAM: IN LIGHT OF THE FACT THAT THE COURT
5 HAS GIVEN THAT TESTIMONY CONSIDERATION, THE GOVERNMENT
6 ASKS THAT THE TRANSCRIPTS FROM BOTH TRIALS, FROM
7 MR. LIVESAY'S TESTIMONY BE INCLUDED IN THE RECORD, PLEASE.

8 MR. SPINA: SAME OBJECTION. WITH THE COURT
9 HAVING IMPOSED THE SAME SENTENCE REGARDLESS OF --

10 THE COURT: ABSOLUTELY. ABSOLUTELY. BECAUSE THE
11 FACTORS THAT I HAVE CONSIDERED, THE EVALUATION OF THE
12 OTHER SENTENCES IMPOSED, WHETHER THEY WOULD HAVE BEEN THE
13 ONE IS THAT THIS COURT WOULD HAVE IMPOSED, IF DOING SO
14 ORIGINALLY OR NOT, FAR OUTWEIGHS THE GOVERNMENT'S REQUEST
15 FOR A SENTENCE OF CUSTODY IN THIS CASE.

16 MR. INGRAM: I UNDERSTAND THE COURT'S POSITION,
17 YOUR HONOR, BUT THE GOVERNMENT WOULD LIKE TO OFFER THE
18 TESTIMONY OF MR. LIVESAY IN THE SCRUSHY TRIAL AND THE
19 CRUMPLER TRIAL AS PART OF THE RECORD IN THIS PROCEEDING.

20 THE COURT: I WILL TELL YOU WHAT I WILL DO. IF
21 YOU DETERMINE IT NECESSARY YOU CAN FILE A WRITTEN MOTION
22 REQUESTING TO DO SO.

23 MR. INGRAM: FOR LEAVE TO SUBMIT THOSE AS PART OF
24 THE RECORD?

25 THE COURT: IF YOU DECIDE YOU NEED TO.

1 MR. INGRAM: VERY WELL, YOUR HONOR. THE
2 GOVERNMENT ALSO HAS SEVERAL OBJECTIONS IT WOULD LIKE TO
3 PLACE ON THE RECORD AT THIS TIME, YOUR HONOR. THE
4 GOVERNMENT WOULD OBJECT TO THE EXTENT OF THE DEPARTURE FOR
5 THE COURT'S SENTENCE UNDER SENTENCING GUIDELINE 5K1.1.
6 GOVERNMENT ALSO OBJECTS TO THE UNREASONABLE VARIANCE THAT
7 WAS GIVEN TO THE FACTORS UNDER 3553(A), PARTICULARLY THE
8 NATURE OF THE OFFENSE IN QUESTION IN THIS CASE AND ALSO
9 THE COURT'S CONSIDERATION OF SENTENCING DISPARITY. THE
10 GOVERNMENT ALSO OBJECTS TO THE COURT'S CONSIDERATION OF
11 FACTORS THAT WE BELIEVE WERE CONSIDERED FOR THE 5K AND
12 THEN AGAIN CONSIDERED IN THE COURT'S VARIANCE,
13 SPECIFICALLY MR. LIVESAY'S TESTIMONY THAT WAS GIVEN IN THE
14 RELATED CIVIL PROCEEDINGS.

15 THE COURT: NOW, WAIT A MINUTE. I CAN'T CONSIDER
16 HIS TESTIMONY IN THE CIVIL CASES IN CONSIDERING 5K. AND I
17 DIDN'T. BUT I CONSIDERED THAT IN, AS ONE OF THE MANY
18 FACTORS ABOUT HIS CHARACTER OR WHATEVER UNDER THE
19 SENTENCING FACTORS. BUT I WANT TO BE CLEAR, I DID NOT
20 CONSIDER THAT AT ALL IN GRANTING YOUR 5K MOTION.

21 MR. INGRAM: YOUR HONOR, VERY WELL.
22 NEVERTHELESS, JUST TO PRESERVE THE RECORD, I WOULD LIKE TO
23 LODGE THAT OBJECTION THAT IN THE EVENT THAT THE COURT,
24 UPON RECONSIDERATION OF THE RECORD, DID CONSIDER, GIVE
25 UNDUE CONSIDERATION TO HIS TESTIMONY IN THE CIVIL CASES AS

1 PART OF ITS SENTENCING DETERMINATION, WE WOULD OBJECT TO
2 THAT.

3 MR. SPINA: YOUR HONOR, I OBJECT TO HIM SAYING
4 THAT. THAT'S NOT WHAT THE COURT DID. I MEAN, YOU JUST
5 CAN'T MAKE UP STUFF AND SAY I AM GOING TO OBJECT BECAUSE
6 WE THINK THE COURT SAID THIS. SHE DIDN'T SAY THAT.

7 MR. INGRAM: YOUR HONOR, MR. SPINA HAS SPENT MOST
8 OF THIS PROCEEDING ATTEMPTING TO PUT WORDS IN THE
9 GOVERNMENT'S MOUTH. I WOULD LIKE TO LODGE THE
10 GOVERNMENT'S OBJECTION ON BEHALF OF THE UNITED STATES ON
11 THE RECORD WITHOUT MR. SPINA'S EDITORIAL COMMENTS.

12 MR. SPINA: GOOD. I ACCEPT IT. I AM GRATIFIED
13 BY IT BEING INCENSED BY MY BEHAVIOR.

14 THE COURT: OKAY. HAVE YOU GOT OTHER
15 OBJECTIONS?

16 MR. INGRAM: ONE OTHER OBJECTION I WOULD LIKE --
17 THE GOVERNMENT OBJECTS TO THE UNREASONABLE SUBSTANTIVE
18 CONSIDERATION OF THE FACT THAT MR. LIVESAY, IN THE COURT'S
19 OPINION, CEASED INVOLVEMENT OF THE FRAUD GIVEN HIS
20 TESTIMONY IN CRUMPLER AND SCRUSHY. THAT'S ALL FOR THE
21 GOVERNMENT, YOUR HONOR. THANK YOU.

22 THE COURT: OKAY.

23 MR. SPINA: I HAVE NO OBJECTIONS, YOUR HONOR.

24 THE COURT: MR. LIVESAY, YOU HAVE THE RIGHT TO
25 APPEAL THE SENTENCE IMPOSED WITHIN TEN DAYS IF YOU BELIEVE

1 THAT THE GUIDELINES HAVE BEEN MISAPPLIED OR THE SENTENCE
2 IS OTHERWISE IN VIOLATION OF THE LAW. IF YOU ARE UNABLE
3 TO PAY THE COST, YOU MAY APPLY FOR LEAVE TO APPEAL IN
4 FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL. IF YOU ARE
5 SO ALLOWED, UPON YOUR REQUEST, THE CLERK OF THE COURT WILL
6 ASSIST YOU IN PREPARING AND FILING THE NOTICE OF APPEAL.

7 IS THERE ANYTHING ELSE THAT WE NEED TO TAKE UP?

8 MR. SPINA: YOUR HONOR, THERE WAS A \$750,000
9 FORFEITURE THAT WAS PREVIOUSLY IMPOSED, AND I DON'T KNOW,
10 I REMEMBER US TALKING ABOUT IT -- OH, HE DID?

11 THE COURT: I HAVE REIMPOSED IT AND NOTED IT HAD
12 BEEN PAID IN FULL.

13 MR. SPINA: I MUST HAVE DRIFTED OFF THEN. THANK
14 YOU, JUDGE.

15 THE COURT: THAT'S ALL RIGHT. ANYTHING ELSE?

16 MR. SPINA: NO, MA'AM.

17 MR. INGRAM: THANK YOU, YOUR HONOR.

18 THE COURT: AND LET ME REITERATE, I BELIEVE IT'S
19 TIME FOR THIS TO COME TO AN END.

20 (COURT IN RECESS)
21
22
23
24
25

C E R T I F I C A T E

IN RE: USA V. KENNETH K. LIVESAY

2:03-CR-182-KOB

I HEREBY CERTIFY THAT THE FOREGOING
TRANSCRIPT IN THE ABOVE-STYLED CAUSE IS TRUE AND
ACCURATE.

JULY 30, 2008

\S\LINDY M. FULLER, RMR, CRR,

DATE

FEDERAL OFFICIAL COURT REPORTER